No. 95-1599

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADŽIĆ,

Petitioner,

—vs.—

JANE DOE I, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a federal district court may exercise original jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), over a suit by an alien, for torts only, committed in violation of the law of nations by the leader of an unrecognized state.

(2) Whether an individual who subjects individuals to torture and extrajudicial killing under the actual or apparent authority of a foreign nation may be held liable for civil damages to those individuals under the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (1994).

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 1

STATEMENT 3

I. Background 3

II. Proceedings Below 5

REASONS FOR DENYING THE WRIT 8

I. QUESTIONS ONE AND TWO ARE NOT CERTWORTHY 9

A. Review is Premature 9

B. The Circuits Are Not Divided 10

C. The Unanimous Decision of the Court of Appeals is Correct 15

II. QUESTIONS THREE THROUGH SEVEN ARE NOT CERTWORTHY 24

A. Question Three 24

B. Question Four 27

C. Question Five 28

PAGE

D. Question Six 29

E. Question Seven 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: PAGE

Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) .. 11

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 25

Aguinda v. Texaco, No. 93-7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994)..... 11

Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989) 11

Application of Yamashita, 327 U.S. 1 (1946)..... 16

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 11, 23

Baker v. Carr, 369 U.S. 186 (1962)..... 27

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 19

Burnham v. Super. Ct. of Cal., 495 U.S. 604 (1990)... 7, 29

Cabiri v. Assasie-Gyimah, No. 94 Civ. 3566 (AGS), 1996 WL 191733 (S.D.N.Y. Apr. 18, 1996) 11

Carl Zeiss Stiftung v. VEB Carl Zeiss Jena, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971) 25

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 15

Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) 6, 7, 10, 13, 22

PAGE

Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), *on reconsideration on other grounds* 694 F. Supp. 707 (N.D. Cal. 1988) 11

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 9

Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) 11

House v. Mayo, 324 U.S. 42 (1945)..... 10

Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986) 27

Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991) 27

Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) 20

Linder v. Calero-Portocarrero, 963 F.2d 332 (11th Cir. 1992) 11

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).... 25

Martinez-Baca v. Suarez-Mason, No. C-87-2057 (SC) (N.D. Cal. Apr. 22, 1988)..... 11

Monroe v. Pape, 365 U.S. 167 (1960) 24

Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996)..... 11

Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993) 11

Piper Aircraft v. Reyno, 454 U.S. 235 (1981) 29

Quiros de Rapaport v. Suarez-Mason, No. C-87-2266 (JPV) (N.D. Cal. Apr. 11, 1989)..... 11

PAGE

Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) 12-15

Scheuer v. Rhodes, 416 U.S. 232 (1974) 3

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) 11

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) 12-15, 19-21

The Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844) .. 13, 21

Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1868) 25

Todd v. Panjaitan, Civ. A. No. 92-12255 (PBS), 1994 WL 827111 (D. Mass. Oct. 26, 1994) (mem. op.) . 11

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United States v. Insurance Cos., 89 U.S. (22 Wall.) 99 (1875) 25

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 9-10

W.S. Kirkpatrick & Co. v. *Environmental Tectonics Corp.*, 493 U.S. 400 (1990) 27

Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) 11

Statutes:

15 U.S.C. § 12(a) 26

15 U.S.C. § 61 26

PAGE

18 U.S.C. § 1030(a) 26

18 U.S.C. § 793(a) 26

28 U.S.C. § 1331 ..... 1, 6

42 U.S.C. § 1983 ..... 24, 25

42 U.S.C. § 2274(a)-2277 26

Alien Tort Claims Act, 28 U.S.C. § 1350 ....2, 6, 10, 15, 22

FED. R. CIV. P. 12(b)(3)..... 29

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 11

Judiciary Act ch. 20, § 9, 1 Stat. 73, 77 (1789), *codified at* 28 U..S.C. § 1350. 19

SUP. CT. R. 10..... 1, 8-10

Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note 1, 2, 6, 25

Other Authorities:

Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted in* 22 U.S.C. § 287 note..... 28

Barcelona Traction Light & Power Co. (Belgium v. Spain), 1970 I.C.J. 4 16

David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31 (1995) 22

3 WILLIAM BLACKSTONE, COMMENTARIES 23

PAGE

Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989) 18

William Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986) 18, 19, 23

137 CONG. REC. S1378 (daily ed. Jan. 31, 1991) 21

Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).. 14

Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988) 18, 19

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (James Madison) (J. Elliot ed., 1836) 18

Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pts. 1 & 2), 101 U. PA. L. REV. 26, 792 (1952)..... 17

William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996) 18, 23

THE FEDERALIST (C. Rossiter ed., 1961) 18

Geneva Convention (No. IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277 (entered into force Jan. 26, 1950) 14

PAGE

HOUSE COMM. ON THE JUDICIARY, TORTURE VICTIM PROTECTION ACT, H.R. REP. NO. 367, 102d Cong., 1st Sess. (1991) 20, 21, 25

Indictment, The Prosecutor of the Tribunal against Radovan Karadžić and Ratko Mladić, Case No. IT-95-5-I, Int'l Crim. Trib. – Yugo. (July 24, 1995) (lodged as Exhibit B) 17

In re Galvao, [1963] U.N. Jur. Y.B. 164 29

21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 (Library of Congress, 1912) 18

1 OP. ATT'Y GEN. 57 (1795) 19

26 OP. ATT'Y GEN. 250 (1907) 19

Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985) 18, 24

RAPE AND ABUSE OF WOMEN IN THE FORMER YUGOSLAVIA, GA A/50/329 (1995) 5

Reservations to the Convention on Genocide Case, 1951 I.C.J. 15 (Advisory Opinion) 16

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986) 26, 29

Alfred P. Rubin, *U.S. Tort Suits by Aliens Based on International Law*, 18 FLETCHER FORUM OF WORLD AFF. 65 (1994) 22

Andrew M. Scoble, Note, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127 (1986) 18

PAGE

SENATE COMM. ON FOREIGN RELATIONS & HOUSE COMM. ON FOREIGN AFFAIRS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, 103d Cong., 1st Sess. (Joint Committee Print 1993) ... 4-5

SENATE COMM. ON THE JUDICIARY, TORTURE VICTIM PROTECTION ACT, S. REP. NO. 249, 102d Cong., 1st Sess. (1991) 21

Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995) 7, 22, 23

U.N. Comm'n on Human Rights, FIFTH PERIODIC REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE FORMER YUGOSLAVIA, U.N. Doc. E/CN. 4/1994/47 (1993)..... 5

U.N. Doc. IT/32 (1994), *amended by* U.N. Doc. IT/32/Rev.1 (1994), U.N. Doc. IT/32/Rev.2 (1994), U.N. Doc. IT/32/Rev.3 (1995), *reprinted in* 5 Criminal Law Forum 651 (1994)..... 28

U.N. Security Council, REPORT OF THE SECRETARY-GENERAL, S/25704 (1993)..... 5

U.S. Brief as *Amicus Curiae*, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), 19 I.L.M. 585 (1980) 16, 19

U.S. Brief as *Amicus Curiae*, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), 24 I.L.M. 427 (1985)..... 12

U.S. Dep't of State, BOSNIA AND HERZEGOVINA HUMAN RIGHTS PRACTICES (1995) 5

U.S. Dep't of State, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992 5

PAGE

3 U.S. DEP'T OF STATE DISPATCH 52 (Dec. 28, 1992).. 16

U.S. Statement of Interest, *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (lodged as Exhibit A).....7, 14, 19-20, 25-28

SUMMARY OF ARGUMENT

Respondents Jane Doe I, *et al.*, oppose Radovan Karadžić's petition for a writ of certiorari because the decision below is correct and warrants no further review, particularly in its current interlocutory posture. Petitioner seeks review of a unanimous jurisdictional ruling, supported below by the Solicitor General and the State Department, upon which the circuits are not divided, which presents no extraordinary issue, and which simply remands for pretrial proceedings currently ongoing before the U.S. District Court for the Southern District of New York.

Petitioner now asks this Court to disrupt these proceedings to consider a confused welter of fact-specific questions, none of which comes close to raising the "compelling reasons" required by Supreme Court Rule 10. Review of any of these seven questions would be entirely premature. Substantial pretrial orders have been issued by the district court, and the factual record will soon be dramatically expanded. Should Respondents win at trial and again on appeal, this Court would be free to review that judgment on a fully developed record, avoiding the needless piecemeal litigation that granting this interlocutory petition would engender. Nor would granting certiorari now likely affect the outcome of this case. Petitioner challenges only two of the three jurisdictional grounds relied upon by the Second Circuit. Even if this Court were to grant certiorari and reverse on those grounds, the lower court would likely reinstate its decision based on Respondents' allegation that Petitioner committed torture and summary execution under color of the law of Yugoslavia, and thus should be held liable under the federal question provision, 28 U.S.C. § 1331 (1994), and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (1994) ("TVPA"). This Court should not waste its scarce resources on such pointless interlocutory and advisory review.

More fundamentally, Questions One and Two challenge a unanimous Court of Appeals decision that is plainly correct and supported by an unbroken line of federal court rulings. Fol-

lowing the precise words of the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) ("ATCA" or "§ 1350"), the Second Circuit held that a federal district court may exercise original jurisdiction over a suit by an alien, for torts only, committed in violation of the law of nations. No clearer violations of the law of nations could have occurred than the massive acts of genocide, war crimes, and crimes against humanity committed by Petitioner Karadžić. The Court of Appeals correctly construed the ATCA by applying it to a modern-day international criminal who orders genocidal atrocities to secure and consolidate his rule.

Even if the Second Circuit's reading of the ATCA were not confirmed by two hundred years of judicial, legislative, and executive interpretation, the Court's holding is independently supported by the Torture Victim Protection Act of 1991. By passing the TVPA, Congress explicitly endorsed the construction of the Alien Tort Claims Act that has been adopted by the Second Circuit and federal courts around the country. The TVPA specifies that individuals like Petitioner, who subject individuals to torture and extrajudicial killing under the actual or apparent authority of a foreign nation, may be held liable for civil damages to their victims. 28 U.S.C. § 1350 note. This recent clear statement of congressional intent will provide an alternative basis for decision in most future cases of this type, further obviating any need to review the vague interpretive issues regarding the ATCA raised in Questions One and Two.

Finally, not one of the other questions presented by Petitioner is even remotely certworthy. As elaborated below, Questions Three through Seven involve issues not properly before this Court because they were not raised or decided below; the questions are fact-dependent and hence inappropriate subjects for interlocutory review, or are questions without substance because they are governed by prior controlling decisions of this Court.

Petitioner Karadžić is an indicted war criminal who has sponsored the most brutal campaign of "ethnic cleansing" in Europe since the Holocaust. He has ordered the murder, imprisonment,

rape and other torture of countless individuals like Respondents. Respondents filed this case more than three years ago. Petitioner presents no reason why this Court should expend its scarce resources to intervene, at this interlocutory stage, to further delay his trial and judgment.

STATEMENT

I. Background

Respondents in this case seek compensatory and punitive damages for genocide, war crimes, and crimes against humanity, including rape and other gross human rights violations, carried out by Bosnian-Serb forces under the command of Petitioner Radovan Karadžić.[1] Through a deliberate policy of "ethnic cleansing," Karadžić's forces attempted to eliminate Bosnian-Muslims from Serb-controlled areas of Bosnia-Herzegovina. Complaint ¶¶ 3, 17, Court of Appeals, Joint Appendix ("J.A.") at A8, A14. Their atrocities included rapes, forced pregnancies, castrations, and other forms of torture, and summary execution aimed at permanently altering the demography of Bosnia-Herzegovina. *Id.* ¶ 17, J.A. at A14.

The Serbs living in Bosnia-Herzegovina declared their independence in April 1992, shortly after Bosnia-Herzegovina, like Croatia and Slovenia before it, seceded from the Socialist Republic of Yugoslavia. The U.S. government did not recognize either the Bosnian-Serb government[2] or Karadžić's status

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[1] At all times relevant to the complaint, Karadžić was the commander of the Bosnian-Serb military forces and the self-proclaimed president of the *de facto* government of Srpska, the "state" purporting to represent Bosnian-Serbs living in Bosnia-Herzegovina. Complaint, ¶ 17, Court of Appeals, Joint Appendix ("J.A.") at A14; Pet. App. at A6, *Kadic v. Karadžić*, 70 F.3d 232, 237 (2d Cir. 1995).

On a motion to dismiss for lack of subject matter jurisdiction, the allegations of the complaint must be accepted as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[2] While Bosnia-Herzegovina has received international recognition, including by the United States, the self-proclaimed Bosnian-Serb government has not been recognized internationally by any state nor the United Nations. Complaint ¶ 15, J.A. at A13-14.

as "president" thereof (Complaint ¶ 15, J.A. at A13-14); nor has the U.S. government ever accorded him any form of head-of-state immunity. Dist. Ct. Op. at 7, J.A. at A284 (noting Karadžić's "lack of head-of-state immunity"); *id.* at 7 n.6, J.A. at A284 (citing letter from Department of State to Plaintiffs' counsel which states that Karadžić "enjoys no immunity from the jurisdiction of the courts of the United States," *see* J.A. at A141).

To further their claim to independence, the Bosnian-Serbs, led by Karadžić and aided by the government of the rump Yugoslavia, began to drive Bosnian-Muslims from self-proclaimed Bosnian- Serb territory. They employed a campaign of systematic, brutal violence to further their expansionist goals. Complaint ¶¶ 17-21, J.A. at A14-15. Hundreds of thousands of victims of "ethnic cleansing" were expelled from their homes and villages, rounded up and held in concentration camps, subjected to rape and other forms of torture, and deported and summarily executed—all because of their religion or nationality. *Id.* ¶¶ 3, 16, J.A. at A8-9, A14. At the time Respondents filed their complaint, governmental and independent observers estimated that between 50,000 and 120,000 people had been killed in the war, and over 2 million forced from their homes. *Id.* ¶ 16, J.A. at A14.

Petitioner Karadžić, the leader of the Bosnian-Serbs, ordered the policy of ethnic cleansing and its attendant human rights violations. *Id.* ¶¶ 3, 25-27, J.A. at A8-9, A16-17. Bosnian-Serb forces under his command and control deliberately and intentionally committed egregious violations of international human rights law and the laws of war, including genocide. *Id.*[3]

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[3] The U.S. government concluded that the Bosnian-Serb leadership intentionally employed killing and torture, including rape, to destroy the non-Serb population of Bosnia-Herzegovina. In 1993, for example, the State Department reported to Congress:

> On a scale and scope not seen for half a century, barbarous leaders consciously used atrocities of the most vile nature, including wholesale rape of women in Bosnia, to drive ethnic populations from their home.

(*footnote continued*)

Throughout their military campaign, the Bosnian Serbs were supported by the Yugoslav government and its army. *Id.* ¶¶ 6, 16, J.A. at A9, A11.

The atrocities committed against Respondents Jane Doe I and Jane Doe II are representative of those inflicted by Karadžić's forces. On May 31, 1992, while Jane Doe I was imprisoned in a Bosnian-Serb concentration camp, a group of Bosnian-Serb soldiers held her and five other young women at gunpoint, forced them to undress and began to rape them, several at a time. Jane Doe I was raped repeatedly, by at least eight soldiers. When she resisted, the soldiers hit her, and slashed her breasts with a knife. Two of the young women who were tortured with her disappeared and are presumed murdered. *Id.* ¶¶ 21-23, J.A. at A15-16.

Jane Doe II was living with her mother and younger brother in Bosnia-Herzegovina, when two Bosnian-Serb soldiers entered her home at about 4:00 in the morning. The soldiers soon began to beat her and her mother, then raped and murdered her mother. The murderer turned to Jane Doe II with a bloody knife and said that it was her turn. The two children managed to escape with the help of a neighbor. *Id.* ¶¶ 8, 24, J.A. at A11-12, A16.

II. Proceedings Below

On February 11, 1993, Respondents filed this suit as a class action, on behalf of Jane Does I and II and all women and men

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SEN. COMM. ON FOREIGN RELATIONS & HOUSE COMM. ON FOREIGN AFFAIRS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, 103d Cong., 1st Sess. at xiii (Joint Committee Print 1993); *see also* U.S. Dep't of State, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992 721-25; U.S. Dep't of State, BOSNIA AND HERZEGOVINA HUMAN RIGHTS PRACTICES 3, 17 (1995).

U.N. investigations have reached the same conclusions. *See, e.g.*, U.N. Security Council, REPORT OF THE SECRETARY-GENERAL PURSUANT TO S.C.R. 808, S/25704 (1993) at ¶ 40, pp. 10-11; U.N. Comm'n on Human Rights, FIFTH PERIODIC REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE FORMER YUGOSLAVIA, U.N. Doc. E/CN.4/1994/47 (1993); RAPE AND ABUSE OF WOMEN IN THE AREAS OF ARMED CONFLICT IN THE FORMER YUGOSLAVIA, GA A/50/329 (1995).

who suffered rape, summary execution, other torture or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb military forces under the command and control of Petitioner Karadžić. Complaint ¶¶ 9-14, J.A. at A12-13. Respondents cited, *inter alia*, the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) ("ATCA" or "§ 1350"),[4] the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note (1994),[5] and the federal question provision, 28 U.S.C. § 1331 (1994).

Without notice to the parties or briefing or argument on the subject-matter jurisdiction issue, on September 7, 1994, the United States District Court for the Southern District of New York (Leisure, J.) dismissed Respondents' suit against Karadžić, ruling: (1) that acts of genocide, war crimes, and crimes against humanity do not violate the law of nations, so long as they are "committed by non-state actors," J.A. at A289; (2) that the Second Circuit's holding in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which found jurisdiction against official torturers under the ATCA, applies only to the conduct of officials of *recognized* governments, J.A. at A292; and (3) that the possibility that the United States government might, *at some point in the future*, formally recognize Karadžić's government, declare him a head of state, and suggest absolute immunity on his behalf somehow "militates against this Court exercising jurisdiction over the instant action," J.A. at A285.

Following oral argument on Respondents' appeal, the Court of Appeals called for the views of the United States government, which were presented to the Court by the Solicitor Gen-

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[4] The ATCA states: "The district courts shall have original jurisdiction of *any* civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added).

[5] The TVPA provides a cause of action for victims of torture or summary execution against any individual, regardless of nationality, who has committed such acts "under actual or apparent authority, or color of law, of any foreign nation . . . ." TVPA § 2(a), 28 U.S.C. § 1350 note.

eral and the State Department in a Statement of Interest of the United States filed on September 13, 1995 ("U.S. Statement of Interest," lodged with the Court as Exhibit A). In urging this Court to reverse the District Court's judgment, the United States Government supported Respondents' position in all key aspects. The Solicitor General argued that the Alien Tort Claims Act affords jurisdiction over violations of the law of nations committed by non-state actors; that Petitioner was not immune from suit while in the United States; and that dismissal under the political question doctrine was not warranted.

Relying on the plain language of the ATCA, as interpreted in the line of federal decisions beginning with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), the Court of Appeals unanimously reversed the District Court and upheld subject matter jurisdiction over Respondents' claims. The panel (Newman, C.J., Walker & Feinberg, JJ.) reversed and remanded to the District Court for further proceedings, ruling: (1) jurisdiction over violations of the law of nations under the Alien Tort Claims Act includes claims of genocide and war crimes committed by non-state actors, Pet. App. at A18-21, *Kadic v. Karadžić*, 70 F.3d 232, 242 (2d Cir. 1995); (2) a representative of an unrecognized state acts under color of law for the purposes of the Torture Victim Protection Act, Pet. App. at A24-27, 70 F.3d at 244-45; (3) service of the summons and complaint upon Petitioner while he was physically present in the United States conferred personal jurisdiction over him, Pet. App. at A30, 70 F.3d at 247 (citing *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990)); and (4) Petitioner was entitled to no statutory or common law grant of immunity from suit, Pet. App. at A31-34, 70 F.3d at 247-48.

Karadžić then petitioned for rehearing and rehearing en banc, citing, *inter alia*, a recent law review article which set forth a novel reinterpretation of the early history of the Alien Tort Claims Act.[6] In denying rehearing on February 4, 1996, the

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[6] *See* Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995). *See* discussion *infra* sec. I(C).

Second Circuit panel rejected this attempt to narrow the ATCA. The panel noted the broad language chosen by the drafters, and noted that Congress had codified a broad reading of the statute in 1992 when it enacted the Torture Victim Protection Act. The full Court of Appeals then denied rehearing en banc without dissent. Pet. App. at A42, *Kadic v. Karadžić*, 74 F.3d 377 (2d Cir. 1996).

On remand, the District Court held a status conference and issued an order on April 22, 1996, lodged as Exhibit C, which denied Petitioner's motions to dismiss for failure of service of process and to stay discovery pending this Court's decision on the petition for certiorari. The District Court ordered Petitioner to answer the complaint by May 22, 1996. Respondents are accordingly preparing to serve their discovery requests.

REASONS FOR DENYING THE WRIT

The writ should be denied because review of the Second Circuit's fact-specific decision would be premature and a waste of this Court's resources. Petitioner identifies no "compelling reasons" why the petition should be granted at this stage, *see* SUP. CT. R. 10, nor any issues on which the circuits are divided. To the contrary, all prudential considerations weigh against review of these questions. With the passage of the Torture Victim Protection Act in 1992, Congress expressly endorsed the Second Circuit's interpretation of the Alien Tort Claims Act. Most future cases will proceed under the new statute as well as the ATCA, thus diminishing the significance of the ATCA interpretation issues raised in Questions One and Two.

More fundamentally, the decision below was correct. The Second Circuit held, following the language of the Alien Tort Claims Act and a long line of circuit court precedent, that a federal district court may exercise original jurisdiction over a suit by an alien, for torts only, committed in violation of the law of nations. No clearer violations of the laws of nations could have occurred than those ordered by Petitioner Karadžić. The Second Circuit further held, following the precise words

of the TVPA, that individuals like Petitioner, who subject individuals to torture and extrajudicial killing under the actual or apparent authority of a foreign nation, may be held liable to their victims for civil damages. Petitioner offers no reason why these straightforward statutory readings are incorrect. Nor does Petitioner offer any reason why such important questions of federal law should be heard in the state, rather than the federal, courts.

Finally, none of the other questions raised by Petitioner is even remotely certworthy. All address issues which are either fact-specific, not fully passed on below, negated by assertions of the United States government before the Court of Appeals, or governed by clear holdings of this Court.

I. QUESTIONS ONE AND TWO ARE NOT CERTWORTHY.

A. Review is Premature: Petitioner seeks review of a unanimous interlocutory jurisdictional ruling, supported below by the Solicitor General and the State Department, which presents no extraordinary issue, and that simply remands for pretrial proceedings that are currently ongoing before the District Court. To interrupt these proceedings would ensnare this Court in fact-specific questions that ought not be reviewed absent a fuller factual record.

This Court grants petitions for certiorari "only for compelling reasons." SUP. CT. R. 10. Review of interlocutory orders is granted "sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). It would be pointless for this Court to grant certiorari to review a nonfinal order in a case in which full pretrial proceedings are ongoing, during which new facts and additional legal claims are being raised and decided, and where the facts developed at trial will substantially aid this Court's determination. As Justice Scalia recently noted: "We generally await final judgment in the lower courts before exercising our jurisdiction." *Virginia Military Institute v. United*

States, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari) (citations omitted). Granting certiorari now would improvidently force this Court into review of piecemeal litigation; denying certiorari, by contrast, will "import[ ] no expression of opinion upon the merits of [the] case," but rather ensure that the lower courts and, if need be, this Court, will ultimately review this case on a fully developed, rather than fragmented, record. *House v. Mayo*, 324 U.S. 42, 48 (1945); *Virginia Military Institute v. United States*, 508 U.S. at 946 (Scalia, J., concurring in denial of certiorari) (noting that denial of review "does not, of course, preclude [Petitioner] from raising the same issues in a later petition, after final judgment has been rendered" and full range of legal and factual issues has been determined at trial).

B. The Circuits Are Not Divided: Nor need the Court review the order to secure uniformity of decision, SUP. CT. R. 10, because no circuit split exists on the narrow questions here. The ATCA states:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. In 1980, the Second Circuit ruled in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) that § 1350 empowers a federal court to hear claims by aliens for torts in violation of fundamental norms of international law. In *Filártiga*, as here, plaintiffs sued for torture and other gross violations of fundamental human rights. The Second Circuit adopted the view urged by the United States Departments of Justice and State and unanimously held that ATCA jurisdiction is proper where aliens sue individuals for tortious injuries committed in violation of peremptory norms of customary international law. *Id.* at 878.

Since 1980, federal courts have consistently reaffirmed *Filártiga* and its underlying principle.[7] The *Filártiga* principle

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[7] Contrary to Petitioner's hopelessly confused discussion of sovereign immunity and the Alien Tort Claims Act, neither *Filártiga* nor

has been followed without variance by courts in the First,[8] Second,[9] Ninth,[10] and Eleventh Circuits.[11] The instant case squarely follows this governing precedent. The Second Circuit analyzed the law in the same manner as the courts in the above-cited

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the decision of the Second Circuit in this case conflicts with this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). *See* Pet. at 10-11, 17-18. In an action against a foreign state, *Amerada Hess* held that suits under the ATCA do not constitute exceptions to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (1994) ("FSIA"). As this Court specified in *Amerada Hess*, the FSIA has no relevance to ATCA claims which do not involve foreign states as defendants:

> The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states.

488 U.S. at 438. The case at hand, of course, was filed against an individual, not a foreign state.

[8] *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 178-83 (D. Mass. 1995); *Todd v. Panjaitan*, Civ. A. No. 92-12255 (PBS), 1994 WL 827111 (D. Mass. Oct. 26, 1994) (mem. op.).

[9] *See, e.g., Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989); *Cabiri v. Assasie-Gyimah*, No. 94 Civ. 3566 (AGS), 1996 WL 191733 (S.D.N.Y. Apr. 18, 1996); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996); *Aguinda v. Texaco*, No. 93-7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994).

[10] *See, e.g., Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472-76 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); *Trajano v. Marcos*, 978 F.2d 493, 498-503 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993); *Quiros de Rapaport v. Suarez-Mason*, No. C-87-2266 (JPV) (N.D. Cal. Apr. 11, 1989); *Martinez-Baca v. Suarez-Mason*, No. C-87-2057 (SC) (N.D. Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987), *on reconsideration on other grounds* 694 F. Supp. 707 (N.D. Cal. 1988). *See also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993).

[11] *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir. 1996); *Paul v. Avril*, 812 F. Supp. 207, 211-12 (S.D. Fla. 1993); *see also Linder v. Calero-Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992) (reversing dismissal of tort claim arising out of torture and execution of wounded non-combatant in violation of laws of war).

cases, applied the same interpretation of the scope of the Alien Tort Claims Act, and reached a jurisdictional determination that followed the holdings of each of those cases.

Contrary to Petitioner's claim, the decision below creates no split with the D.C. Circuit's rulings in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) and *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). In *Tel-Oren*, a sharply splintered panel (Edwards, Bork & Robb, JJ.) divided three ways in affirming the dismissal of a claim of terrorism brought under the ATCA against the Palestine Liberation Organization ("PLO"). Far from stating a crisp rule opposing *Filártiga*, the division in the panel made "it . . . impossible to say even what the law of this circuit is" with regard to the scope of the ATCA. *Tel-Oren*, 726 F.2d at 823 (Bork, J., concurring). In successfully urging this Court to deny certiorari, the Solicitor General noted:

> Neither the court of appeals' judgment order nor the reasoning set forth in the lengthy concurring opinions of the participating judges creates any clear conflict in the circuits. The only proposition for which the judgment below may fairly be read—that in the circumstances of this case, Petitioners have not alleged facts sufficient to support the district court's exercise of subject matter jurisdiction—does not conflict with the Second Circuit's decision in *Filártiga*.

U.S. Brief as *Amicus Curiae*, *Tel-Oren* at 7, 24 I.L.M. 427, 431 (1985). While one panel member, Judge Robb, failed even to reach the *Filártiga* question,

> Judges Edwards and Bork each took pains to point out that his reading of the Alien Tort Statute, if adopted by the panel, would not necessarily conflict with the decision of any other circuit, including the Second Circuit's decision in *Filártiga v. Peña- Irala*, *supra*.

Id. at 9-10 (citing Edwards, 726 F.2d at 790-91; Bork, 726 F.2d at 819-20).[12] Similarly, in the D.C. Circuit's decision in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (1985), then-Judge Scalia emphasized that "nothing in [this] decision necessarily conflicts with the decision of the Second Circuit in *Filártiga v. Peña-Irala*." *Sanchez-Espinoza*, 770 F.2d at 207 n.5.

Nor does the Second Circuit's ATCA holding with regard to nonstate actors in any way conflict with the D.C. Circuit's holdings in *Tel-Oren* or *Sanchez-Espinoza*. The panel below unanimously held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals" and hence may be raised in an ATCA suit against the head of an unrecognized state. Pet. App. at A12, 70 F.3d at 239. In *Tel-Oren*, Judges Edwards and Bork rejected ATCA jurisdiction over a claim of terrorism committed by the PLO, but both recognized that certain torts violate international law even when committed by private actors. Judge Edwards recognized a "handful of crimes to which the law of nations attributes individual responsibility," *Tel-Oren*, 726 F.2d at 795, and Judge Bork recognized that piracy—a crime which involves no state action[13]—falls within the original scope of the ATCA. *Id.* at 813-15. In this case, the

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[12] In particular, Judge Bork distinguished *Filártiga* as a case in which "the defendant was clearly the subject of international-law duties, the challenged actions were not attributed to a participant in American foreign relations, and the relevant international law principle was one whose definition was neither disputed nor politically sensitive." *Tel-Oren*, 726 F.2d at 820. Here, Karadžić is clearly the subject of international-law duties not to engage in genocide, war crimes, or crimes against humanity; his challenged actions cannot be attributed to a participant in American foreign relations; and the relevant international law principles are not ones whose definitions are disputed or politically sensitive. *See* Pet. App. at A13, 70 F.3d at 239-40 ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Claims Act for acts of genocide, war crimes, and other violations of international law."); *id.* at A16-22, 70 F.3d at 241-43 (defining each of those violations in detail).

[13] *See, e.g.*, *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844) (pirates act "without . . . any pretense of public authority.").

Second Circuit simply found that genocide and war crimes also constitute violations that may be committed by private actors. Pet. App. at A15-22, 70 F.3d at 241-43.[14] In so ruling, the Court of Appeals relied, *inter alia*, on express language in treaties that have been ratified by the United States forbidding even supposedly private acts of genocide and war crimes. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) ("persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials, *or private individuals*") (emphasis added); Geneva Convention (No. IV) Respecting the Laws & Customs of War on Land, 36 Stat. 2277 (entered into force Jan. 26, 1950) (applying laws of war to all "parties" to a conflict, including insurgent military groups).

Similarly, in *Sanchez-Espinoza*, a case filed against the U.S. government and the Nicaraguan *Contras*, then-Judge Scalia stated only that the law of nations did not reach "private, non-state conduct of *this sort*," *id.* at 206-07, which violates no treaty of the United States: namely, the private operation of "paramilitary training camps in the United States." *Id.* at 205 (emphasis added); *see also id.* at 206 ("We are aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals."). As the U.S. Government stated to the Second Circuit in this case, the violations of international law alleged here (genocide, war crimes, and crimes against humanity) are "of a substantially different nature" than those in *Sanchez-Espinoza*. U.S. Statement of Interest at 14 (lodged as Exhibit A). Indeed, in *Sanchez-Espinoza* itself, then-Judge Scalia explicitly acknowledged that

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[14] Judges Bork and Edwards both also found that the defendant in *Tel-Oren*, the Palestine Liberation Organization, did not meet the international definition of a state. *Tel-Oren*, 726 F.2d at 791 (Edwards, J.); *Tel-Oren*, 726 F.2d at 803-04 (Bork, J.) By contrast, the *de facto* regime headed by Petitioner meets that definition. *See* Pet. App. at A26, 70 F.3d at 245. Individuals acting on behalf of a *de facto* state act "under color of law" for the purposes of international law. *See infra* notes 32-34 and accompanying text.

the Alien Tort Claims Act might cover "private, nongovernmental acts *that are contrary to treaty or the law of nations*—the most prominent examples being piracy and assaults on ambassadors." *Sanchez-Espinoza*, 770 F.2d at 206 (emphasis added).

C. The Unanimous Decision of the Court of Appeals is Correct: With respect to the Alien Tort Claims Act (Questions One and Two), the Second Circuit held only, following the precise words of the statute, that a federal district court may exercise original jurisdiction over a suit by an alien, for torts only, committed in violation of the law of nations. Applying the now well-accepted analysis dictated by *Filártiga* and its progeny, the Second Circuit found that these aliens had alleged violations of fundamental norms of international law, and thus properly triggered jurisdiction under that statute.

In so holding, the Second Circuit merely ruled that the ATCA means what it says: when an alien brings a suit for torts in violation of the customary law of nations or treaties of the United States, the federal court properly asserts jurisdiction under 28 U.S.C. § 1350. As this Court "has stated time and again, . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). While the extent of the actionable violations under the ATCA may be a lingering point of academic debate, this essential teaching is accepted in every court that has ruled on the matter, including Judge Bork in *Tel-Oren* and the D.C. Circuit in *Sanchez-Espinoza*.

No clearer violation of the laws of nations could have occurred than the brutal acts of genocide, rape and other torture, and summary execution ordered by Petitioner Karadžić. Whether or not one might challenge the application of the ATCA to less heinous international acts, the crimes alleged here—including genocide, war crimes, and crimes against humanity—are universal in nature and violate international law whether committed by private individuals or officials of

unrecognized states, thus bringing them within the scope of the ATCA.[15]

Genocide is perhaps the most egregious abuse known to humanity,[16] while the prohibition against war crimes forms a fundamental tenet of the law of nations.[17] Petitioner Karadžić's responsibility for these egregious international law violations has been confirmed repeatedly by both U.S. and international sources. As the Second Circuit recognized:

> [T]he injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadžić and carried out by the military forces under his command.

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[15] The United States' *amicus* brief in *Filártiga* outlined the types of human rights claims over which U.S. courts could properly assert jurisdiction under § 1350:

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection.

U.S. Brief as *Amicus Curiae*, *Filártiga* at 20, 19 I.L.M. 585, 603 (1980). Where, as in this case, a court finds such an international consensus and wide understanding, the court is obligated to exercise jurisdiction under § 1350.

[16] The International Court of Justice described genocide as:

> involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and . . . which is contrary to moral law and the spirit and aims of the United Nations.

Reservations to the Convention on Genocide Case, 1951 I.C.J. 15, 23 (Advisory Opinion). *See also Barcelona Traction Light & Power Co.* (Belgium v. Spain), 1970 I.C.J. 4, 32 (holding genocide, slavery, and acts of aggression "obligations *erga omnes* [against everyone]").

[17] Fifty years ago, this Court reviewed a pattern of wartime abuses strikingly similar to those alleged in this case, and held that such acts "are recognized in international law as violations of the law of war." *Application of Yamashita*, 327 U.S. 1, 14 (1946). The Court specifically found that the laws of war are part of the law of nations. *Id.* at 7.

Pet. App. at A6, 70 F.3d at 237. As early as December 1992, then-U.S. Secretary of State Lawrence S. Eagleburger publicly named Karadžić as one of a small group of "individuals suspected of war crimes and crimes against humanity."[18] These suspicions were confirmed on July 24, 1995, when the International Criminal Tribunal for the Former Yugoslavia ("International Tribunal") filed a 16-count indictment against Petitioner Karadžić, charging him with genocide, crimes against humanity, and grave breaches of the laws or customs of war.[19]

Where, as here, the defendant has committed torts that violate obligatory, definable, and universal norms of international law, the judicial, legislative, and executive branches all agree that the victims may invoke the jurisdiction of the Alien Tort Claims Act. As the circuit and district courts have recognized,[20] the first Congress enacted the ATCA as part of the First Judiciary Act of 1789. In so doing, Congress recognized that torts in violation of the law of nations were transitory torts, for which a tortfeasor could be sued wherever he might be found. Congress enacted the ATCA to encourage the resolution of such suits in federal, rather than state court, when they raise important questions of international law. *See generally* Edwin D. Dickinson, *The Law of Nations as Part of the National Law*

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[18] 3 U.S. DEP'T OF STATE DISPATCH 52, 1992 WL 3118358 (Dec. 28, 1992) (Statement at international conference on the former Yugoslavia, Geneva, Switzerland, December 16, 1992).

[19] The indictment was subsequently confirmed by judicial order. The Tribunal's indictment, lodged with the Court as Exhibit B, confirms the fundamental point presented by Respondents: regardless of whether Karadžić is characterized as a private person, the leader of a *de facto* regime, or a person acting under color of the law of Yugoslavia, he is individually responsible for his crimes in violation of the law of nations, and thus capable of committing torts in violation of the law of nations actionable under both the ATCA and the TVPA. *See* Indictment, The Prosecutor of the Tribunal against Radovan Karadžić and Ratko Mladić, Case No. IT-95-5-I, Int'l Crim. Trib. – Yugo. (July 24, 1995) (lodged with the Court as Exhibit B).

[20] *See supra* cases cited in notes 8-11.

of the United States (pts. 1 & 2), 101 U. PA. L. REV. 26, 792 (1952). Indeed, these concerns led Alexander Hamilton to argue forcefully for federal jurisdiction over all cases involving aliens:

> So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

THE FEDERALIST No. 80, at 477 (Alexander Hamilton) (C. Rossiter ed., 1961).[21] The Framers were also motivated by a fear that state courts might be unsympathetic to aliens and that the denial of justice to an alien in a state court might embroil the United States in an unwanted dispute with a foreign nation.[22]

The ATCA was Congress' response to this concern.[23] This Court has accordingly described the ATCA as one of several

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[21] *See also* THE FEDERALIST No. 3, at 43 (John Jay) (C. Rossiter ed., 1961); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 530-36 (James Madison) (J. Elliot ed., 1836); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988).

[22] Commentators who have studied the legislative history of the First Judiciary Act, and particularly that of the ATCA, overwhelmingly conclude that section 1350 "was intended to avoid local bias in aliens' suits and to obtain uniform judicial interpretation and application of the law in cases implicating international concerns." Andrew M. Scoble, Note, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 132-33 (1986). *See also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); D'Amato, *supra* note 21; William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 11-31 (1985).

[23] Scholars have traced the origins of the ATCA to a 1781 Resolution of the Continental Congress. *See* Burley, *supra* note 22, at 477; William Casto, *The Federal Courts' Protective Jurisdiction Over Torts*

statutes "reflecting a concern for uniformity in this country's dealings with foreign nations and . . . a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964). The *Filártiga* approach to subject matter jurisdiction under 28 U.S.C. § 1350 honors this design, and has therefore been adopted by the Second, Ninth, and Eleventh Circuits, as well as by every district court that has considered the question.

More than two hundred years ago, the Attorney General agreed that "there can be no doubt that" aliens injured by transitory torts committed in violation of the law of nations—the ransacking and plundering of a British colony—"have a remedy by a civil suit in the courts of the United States" under § 1350. 1 OP. ATT'Y GEN. 57, 59 (1795) (emphasis omitted). Since then Executive Branch practice has consistently supported this interpretation of the ATCA.[24] *See, e.g.*, 26 OP. ATT'Y GEN. 250, 253 (1907) (when aliens sue for damages caused in Mexico by American company, ATCA "provide[s] a forum and a right of action," if acts complained of violate law

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Committed in Violation of the Law of Nations, 18 CONN. L. REV. 467, 490-91 (1986); Dodge, *supra* note 22, at 226-29. At that time, Congress urged the states to authorize suits for damages by parties injured by infringements on the rights of ambassadors, violations of safe-conducts, infractions of treaties, and other "offenses against the law of nations, not contained in the foregoing enumeration." Dodge, *supra* note 22, at 227 (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 1136-37 (Library of Congress, 1912)). In 1789, the ATCA shifted jurisdiction over such claims to the federal courts, after a particularly embarrassing international incident (the "Marbois affair") was handled in state courts. Casto, *supra*, at 491-94; Dodge, *supra* note 22, at 229-31; Randall, *supra* note 22, at 24-26. Adopting the broad sweep of the earlier resolution, the original version of the ATCA provided district courts with jurisdiction over "*all* causes where an alien sues for a tort only in violation of the law of nations . . . ." Judiciary Act ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added).

[24] For reviews of this history, see Casto, *supra* note 23, at 502-05; D'Amato, *supra* note 21, at 66-67; *Tel-Oren*, 726 F.2d at 780 (Edwards, J., concurring).

of nations). In *Filártiga*, the U.S. government reaffirmed that longstanding interpretation in an *amicus curiae* memorandum signed by the State Department Legal Adviser and the current Solicitor General, arguing that "in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts." *See* U.S. Brief as *Amicus Curiae* in *Filártiga* at 19, 19 I.L.M. 585, 603 (1980). The Government's Statement of Interest below applied *Filártiga* as the "starting point for the necessary analysis" of the ATCA, U.S. Statement of Interest at 2 (lodged as Exhibit A), and confirmed that "the law of nations can indeed be violated by non-state acts of genocide, war crimes and crimes against humanity." *Id.* at 14. The Solicitor General thus concluded that "the district court erred in dismissing all of plaintiffs' claims on the ground that Karadžić is not a state actor and therefore is not subject to the law of nations governing such conduct." *Id.*

Any doubt as to whether *Filártiga* presents the correct interpretation of the Alien Tort Claims Act was eliminated in 1992 when Congress enacted the Torture Victim Protection Act, which not only endorses and codifies the *Filártiga* approach, but also provides a specific cause of action for individuals, like Respondents, who have suffered torture and summary execution. *See, e.g.*, *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) ("The TVPA codifies the holding in *Filártiga* . . . ."). As the House Report made clear, in enacting the TVPA, Congress strongly approved the reading of the ATCA presented by *Filártiga* and its progeny:

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." Section 1350 has other important uses and should not be replaced. . . . .

> . . . [C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered b[y] section 1350. *That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.*

HOUSE COMM. ON THE JUDICIARY, TORTURE VICTIM PROTECTION ACT, H.R. REP. NO. 367, 102d Cong., 1st Sess. 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (emphasis added).[25]

In sum, Petitioner's claims about the ATCA are entirely rebutted by the great weight of judicial, legislative, and executive opinion. Every court which has considered the ATCA has concluded that it was designed to reach international offenses of a particularly "heinous" character. Piracy, the paradigmatic international law offense for which the statute granted federal court jurisdiction in the late 18th century, was among the most egregious offenses known to humanity, one which rendered its perpetrators "*hostis humani generis*," enemies of all mankind. *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844). In

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[25] In claiming that the Second Circuit's approach somehow conflicts with Judge Bork's concurring opinion in *Tel-Oren*, Petitioner completely ignores the fact that it was written years before the TVPA was enacted. In *Tel-Oren*, Judge Bork suggested that the ATCA be given a narrow reading "unless a modern statute . . . provided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement. Then, at least, we would have a current political judgment about the role appropriate for courts in an area of considerable international sensitivity." *Tel-Oren*, 726 F.2d at 816; *id.*, 726 F.2d at 822 (suggesting the need for "an act of Congress"). The enactment in 1992 of the TVPA provides clear evidence of the congressional desire to have these disputes litigated in U.S. courts. Indeed, the legislative history of the TVPA specifically notes that Congress passed the statute to respond to Judge Bork's questioning of the existence of a private right of action under the ATCA. *See* H. REP. NO. 367 at 4; SENATE COMM. ON THE JUDICIARY, TORTURE VICTIM PROTECTION ACT, S. REP. NO. 249, 102d Cong., 1st Sess. 4 (1991); 137 CONG. REC. S1378 (daily ed. Jan. 31, 1991) (statement of Sen. Specter, sponsor of the TVPA) (stating that TVPA responds to concerns raised in *Tel-Oren*).

the modern era, genocide, war crimes, and crimes against humanity unquestionably fall within the same shameful category. If piracy and attacks on diplomats meet this standard, then surely, so does genocide—recognized since the Holocaust as international law's most serious violation.

Against this background, Petitioner now asks this Court to reverse the Second Circuit's ruling on a ground first raised below on his petition for rehearing. During oral argument, Petitioner argued that *Filártiga* and its progeny did not extend Alien Tort jurisdiction over defendants who are nonstate actors. Yet on rehearing, relying on a single law review article, Petitioner shifted ground and launched a broad challenge to the entire *Filártiga* line of precedent, arguing that history somehow suggests that the First Congress intended jurisdiction under the ATCA to be limited to prize cases. Pet. at 14 (citing Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995)).[26]

The panel correctly rejected that claim, noting that the law review article was "far from conclusive," and that regardless of how the ATCA may have been construed in 1789, that reading had been superseded by Congress' codification of the *Filártiga* approach in the TVPA and the *Filártiga* court's reading of the statutory term "the law of nations" to mean "international law not as it was in 1789, but as it has evolved and exists among

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[26] Petitioner miscites two other articles in support of his argument. Pet. at 14. One affirmatively supports application of the ATCA to a broad range of international law violations, David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 55 (1995) (calling such use of the ATCA "unexceptional"), while the other questions the *process* by which the content of international law is determined, not the assertion of jurisdiction over such cases under the ATCA, Alfred P. Rubin, *U.S. Tort Suits by Aliens Based on International Law*, 18 FLETCHER FORUM OF WORLD AFF. 65, 75 (1994) ("There can be little doubt that normal American rules of jurisdiction permit aliens to bring tort actions in courts of the United States with regard to injuries done them by the acts of other aliens abroad.").

the nations of the world today." Pet. App. at A44, 74 F.3d at 378 (citing *Filártiga*, 630 F.2d at 881.)[27]

In fact, Petitioner's newly minted historical argument not only ignores the extensive historical evidence of the ATCA's origin and purpose, discussed above, but also its plain meaning and governing rules of statutory interpretation. Following Professor Sweeney, Petitioner would now read the word "tort" in the ATCA as referring exclusively to " 'wrongs' under the law of prize." Sweeney, *supra* note 6, at 475. Yet if this were its intent, Congress could have drafted the statute to confer federal court jurisdiction "only for civil actions by an alien for a *wrong under the law of prize.*" As this Court observed skeptically in *Amerada Hess*, 488 U.S. at 436-37, the "Alien Tort Statute makes no mention of prize jurisdiction." Instead, Congress chose much broader language, authorizing the federal courts to hear "*any* civil action by an alien for a tort only," so long as it was "committed in violation of the law of nations or a treaty of the United States" 28 U.S.C. § 1350 (emphasis added). Even in 1789, the term "tort" was commonly understood to have a much broader meaning than prize-related wrongs. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *117 (torts include "actions for trespasses, nusances [sic], assaults, defamatory words and the like").[28] Moreover, as Professor Dodge has demonstrated, the First Congress clearly understood that a variety of torts, not just those arising from prize cases, could violate the law of nations. *See* Dodge, *supra* note 22, at 232-33. Indeed, to accept Petitioner's reading of the ATCA as limited to prize cases would render the statute redundant, since the district courts already had jurisdiction over those very cases under their admiralty and maritime jurisdiction. Dodge, *supra* note

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27 "With a broad reading of the Alien Tort Act settled as the law of this Circuit and codified by Congress as recently as 1991, we decline the invitation to limit the Act to the one category of torts that arguably prompted its enactment." Pet. App. at A44, 74 F.3d at 378.

28 By contrast, even Professor Sweeney, on whose article Petitioner relies, acknowledges that "the word 'tort' was seldom used" in prize cases. Sweeney, *supra* note 6, at 475.

22, at 246-51.[29] Finally, as the Second Circuit panel noted, even assuming *arguendo* that torts committed in prize cases somehow prompted passage of the ATCA, "it does not follow that the statute should be confined" in the present-day to such torts, any more than 42 U.S.C. § 1983 jurisdiction should now be limited to those constitutional violations that existed in 1871, the year that statute was passed.[30] Pet. App. at A43-44, 74 F.3d at 378.

This Court should decline Petitioner's invitation to disrupt a well-settled line of circuit precedent, endorsed by two hundred years of executive branch opinion and recently reaffirmed by a modern Congress, based on an incorrect law review article whose analysis has in any event been wholly superseded by modern legislative enactment.

II. QUESTIONS THREE THROUGH SEVEN ARE NOT CERTWORTHY

A. Question Three (whether Petitioner is liable under the Torture Victim Protection Act) is not certworthy, because the Second Circuit found the TVPA applicable on two alternative grounds, one of which is a straightforward application of the TVPA which Petitioner does not challenge. In addition, both

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[29] The article cited by Petitioner unduly stresses the drafters' use of the words "tort only" in the ATCA, while ignoring Congress' broad directive that the federal courts hear "*any* civil action" that meets the jurisdictional prerequisites. But as Professors Randall and Casto have suggested, the word "only" confirms the statute's limitation to tort actions, in order to prevent British creditors from using the ATCA as a means to assert their contract and property claims in federal court. Casto, *supra* note 23, at 507-08; Randall, *supra* note 22, at 28-31. *See also* Dodge, *supra* note 22, at 255 (arguing "only" limited remedies available to British plaintiffs challenging property confiscations).

[30] *See, e.g., Monroe v. Pape*, 365 U.S. 167, 183 (1960) ("Although the legislation [§ 1983] was enacted because of the conditions that existed in the South at the time, it is cast in general language and is as applicable to [other States] as it is to the States whose names were mentioned over and again in debates.").

grounds are fact-bound and hence inappropriate for interlocutory review.

The TVPA affords a cause of action for torture and summary execution committed "under actual or apparent authority, or color of law, of any foreign nation." § 2(a), 28 U.S.C. § 1350 note. The Second Circuit found that Respondents had met this requirement in two ways: first with their allegation that Petitioner acted under color of law of the recognized state of Yugoslavia, Pet. App. at A26, 70 F.3d at 245; and second with their allegation that Petitioner had acted under color of law of "Srpska," the unrecognized state of which he claims to be president. *Id.* at A25-26, 70 F.3d at 244-45. The latter holding as to unrecognized states was not necessary to the resolution of the TVPA question. Thus, even if this Court were to grant the petition and reverse on this issue, the Second Circuit would likely reinstate its decision based on Respondents' allegation that Petitioner had acted under color of law of Yugoslavia, an unexceptional application of the TVPA, and a fact-based issue not appropriate for interlocutory review.[31]

Furthermore, the Second Circuit decision as to the liability of representatives of unrecognized governments under the TVPA is clearly correct. State action does not require action by a recognized government.[32] Where, as here, the regime at issue

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[31] The TVPA's legislative history directs that "Courts should look to 42 U.S.C. Sec. 1983 in construing 'color of law' and agency law in construing 'actual or apparent authority.' " TVPA, H.R. REP. NO. 367, 102d Cong., 1st Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. Under 42 U.S.C. § 1983, it has long been held that action taken by private parties in concert with state actors or with significant state aid is actionable. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

[32] The Court of Appeals noted: "Our courts have regularly given effect to the 'state' action of unrecognized states." Pet. App. at A25, 70 F.3d at 244-45 (citing *United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-03 (1875) (seceding states in Civil War); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9-12 (1868) (same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971) (post-World War II East Germany)).

meets the definition of a state under international law, it is bound by international law whether or not it has been formally recognized by other governments.[33] As the Executive Branch stated in its submission to the Second Circuit:

> [W]hen the perpetrators of human rights violations are, as here, in control of territory and exercise authorities of a governmental character, they may be held accountable under international law even though the regime on whose behalf they act is not recognized and does not satisfy the requirements for independent statehood.

U.S. Statement of Interest at 5-6 n.3 (lodged as Exhibit A). *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986) §§ 201, 202, 702 [hereinafter RESTATEMENT (THIRD)].

Indeed, the opposite conclusion would have had potentially grave unintended consequences. Had the Court below ruled that the words "foreign nation" in the TVPA did not apply to unrecognized *de facto* states, such as North Korea, Taiwan, or Srpska, its ruling would have exempted officials of those states from liability under the act, a perverse result given the punitive purpose behind "withholding recognition." Moreover, numerous other federal statutes prohibit or regulate various kinds of transactions with "foreign nations."[34] To read that language to

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[33] In one example of such individual liability for actions taken on behalf of unrecognized regimes, a Confederate commander was tried for violations of the law of nations, though he had not served a recognized or legitimate state. U.S. Statement of Interest at 10 (lodged as Exhibit A) (citing *Trial of Henry Wirz*, H.R. EXEC. DOC. NO. 23, 40th Cong., 2d Sess. 3-5 (1867)).

[34] *See, e.g.*, 15 U.S.C. § 12(a) (1994) (antitrust measure defining "Commerce" as trade between any territory of the United States and any "State, Territory, or foreign nation"); 15 U.S.C. § 61 (1994) (regulating trade involving export of goods to "any foreign nation"); 18 U.S.C. § 793(a) (1994) (prohibiting transmission of defense information to "any foreign nation"); 18 U.S.C. § 1030(a) (1994) (prohibiting the acquisition of computer data for the purpose of providing an "advantage [to] any foreign nation"); 42 U.S.C. § 2274(a)-2277 (1994) (prohibiting transmission of restricted data to "any foreign nation").

exclude unrecognized states would have carved away or endangered large chunks of previously exercised federal jurisdiction.

B. Question Four (whether the case presents a nonjusticiable political question) is both fact-specific and insubstantial, given that this case involves a straightforward question of statutory interpretation and that the U.S. government has unambiguously favored the exercise of federal jurisdiction under the relevant statutes. "The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991). In *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986), this Court declared that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Accord Baker v. Carr*, 369 U.S. 186, 217 (1962) ("The doctrine . . . is one of 'political questions,' not one of 'political cases.' "). "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them," without a broad, judicially-created "exception for cases and controversies that may embarrass foreign governments" or subject foreign conduct to judicial examination. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990) (Scalia, J.).

Further, no foreign policy or political question concerns obtain here, because the U.S. government has unambiguously favored assertion of federal jurisdiction. Congress has directed the courts to entertain suits under both the ATCA and the TVPA, and the Executive Branch has endorsed the judicial decision of this particular case.[35] Holding Karadžić liable for

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35 "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, *this is not one of them*." U.S. Statement of Interest at 3 (lodged as Exhibit A) (emphasis added).

civil damages is fully consistent with the U.S. government position regarding his criminal accountability before the International Tribunal set up by the U.N. Security Council to prosecute violations of international violations committed in the former Yugoslavia.[36] Civil action in U.S. courts is also expressly authorized by the International Tribunal.[37] Thus, in this case, the federal courts are performing a task assigned to them by Congress, with the full support of the Executive Branch, that is fully consistent with the international enforcement scheme established by the U.N. Security Council.

C. Question Five (whether Petitioner was immune from suit while visiting the United Nations) borders on frivolous, given that both the United Nations and the U.S. government agree that no immunity applies. Petitioner Karadžić indisputably falls into none of the narrow categories of U.N. visitors entitled to immunity under the U.N. Headquarters Agreement.[38] The State Department asserted shortly after this lawsuit was filed that Petitioner's status "has been solely as an 'invitee' of the United Nations, and as such he enjoys no immunity from the juris-

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[36] *See* U.S. Statement of Interest at 7-8 (lodged as Exhibit A).

[37] The rules of the Tribunal expressly assign to national courts the task of conducting civil procedures to obtain compensation for victims of human rights abuses. Rules of Procedure and Evidence, Rule 106(B) ("Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation."), U.N. Doc. IT/32 (1994), *amended by* U.N. Doc. IT/32/Rev.1 (1994), U.N. Doc. IT/32/Rev.2 (1994), U.N. Doc. IT/32/Rev.3 (1995), *reprinted in* 5 Criminal Law Forum 651, 688 (1994).

[38] The Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted in* 22 U.S.C. § 287 note (1988), provides immunity for certain representatives of U.N. member nations, *id.* § 15, and bars service of process within the well-defined "headquarters district" without the consent of the Secretary-General, *id.* § 9(a). Neither provision applies to Petitioner. *See* District Court's April 22, 1996 Memorandum Order denying Petitioner's motion to dismiss for insufficient service of process at 1-2 (lodged with the Court as Exhibit C) (Petitioner was properly served outside the U.N. Headquarters District).

diction of the courts of the United States." Habib Letter, J.A. at A141. The U.S. government repeated this position in its Statement of Interest before the Second Circuit.[39] Finally, where, as here, immunity is governed by a precisely-worded agreement between the U.S. government and an international agency, the courts ought not manufacture an unprecedented common law immunity against suit.

D. Question Six (whether personal jurisdiction over Karadžić was properly obtained by personal service on him while he was physically present within the judicial district) is entirely foreclosed by this Court's unanimous holding in *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990). "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." *Id.* 495 U.S. at 610 (Scalia, J.). Having been properly served within New York State while physically present in the forum, Petitioner has undeniably subjected himself to the jurisdiction of the federal courts sitting in that state.

E. Finally, **Question Seven** (whether this suit should be dismissed on *forum non conveniens*) is not properly before this Court, because Petitioner has not yet even raised the issue below by a FED. R. CIV. P. 12(b)(3) motion. In any event, such a motion is fact-dependent and cannot be considered by this Court absent a prior motion, findings of fact below, and a decision by the district court considering all relevant public and private interest factors. *See Piper Aircraft v. Reyno*, 454 U.S. 235, 237 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . . ."). Moreover, even if Petitioner had made such a motion, this Court's controlling precedent plainly demands that Peti-

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[39] U.S. Statement of Interest at 2-3 (lodged as Exhibit A). The U.N. Legal Counsel has concurred in the conclusion that U.N. invitees are not immune from suit in U.S. courts. *In re Galvao*, [1963] U.N. Jur. Y.B. 164; *see also* RESTATEMENT (THIRD) § 469 (U.N. invitees not immune from suit or legal process while in the United States).

tioner also carry the burden of demonstrating the existence of an adequate and available alternative forum. *Id.*, 454 U.S. at 241. Not only has he failed to introduce any evidence that such a forum exists, he is unlikely to be able to do so, given the Second Circuit's recognition "that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiff's claims." Pet. App. at A39, 70 F.3d at 250.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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